

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SHANE MACK LOWRY,

Plaintiff,

v.

CIVIL ACTION NO. 1:04-0463
(Criminal Action No. 1:02-0003-02)

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Fourth Circuit to determine whether Lowry "has shown excusable neglect or good cause warranting an extension of the ten-day appeal period." Lowry filed a motion for a certificate of appealability on June 6, 2006, which the court construed as a notice of appeal.* Lowry's notice of appeal was filed more than ten days after the court entered judgment on his motion pursuant to 18 U.S.C. § 3582 and, therefore, was outside the ten-day appeal period. Under Federal Rule of Appellate Procedure 4(b)(4), the court may grant Lowry an

* A certificate of appealability is not required for review of a district court's denial of a motion to modify a term of imprisonment under 18 U.S.C. § 3582. See United States v. Hernandez, 2004 WL 1147258, *1 fn (4th Cir. 2004) (unpublished); see also Lowe v. United States, 2007 WL 41951, *1 (M.D. Ga. 2007) (certificate of appealability is not necessary to the appeal of a motion filed pursuant to 18 U.S.C. § 3582(c). Accordingly, the motion should have been construed as a notice of appeal. See United States v. Miller, 2004 WL 2677060, *1 n1 (4th Cir. 2004) (unpublished).

extension of up to thirty days to file a notice of appeal, and such an extension would render Lowry's notice of appeal timely in the present case.

Lowry, however, has not yet provided any showing or basis to establish excusable neglect or good cause. Therefore, the court does not have before it sufficient information to make a determination of good cause or excusable neglect. In light of the remand in this case, the court will allow defendant the opportunity to file a motion setting forth any basis that he contends justifies extension of the appeal period under Rule 4(b)(4). The court will then determine whether defendant has shown excusable neglect or good cause warranting an extension of the appeal period.

IT IS THEREFORE ORDERED that on or before February 22, 2008, Lowry is to file a motion with the Clerk requesting an extension of the appeal period and setting forth any reason he has to show why he was late in filing his notice of appeal and why the court should excuse his late filing.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to Mr. Lowry and to counsel of record.

IT IS SO ORDERED this 23rd day of January, 2008.

ENTER:

A handwritten signature in dark ink, appearing to read "David A. Faber", is written over a horizontal line.

David A. Faber
United States District Judge